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IN THE

Supreme Court of the United States

October Term, 1958

No. 258

UNITED STATES OF AMERICA

—v.—

ALLIED STEVEDORING CORPORATION, JOHN WARD, JOHN POTTER and MICHAEL BOWERS

Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioners, defendants-appellants below, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered on July 11, 1958, affirming the Orders of Judge Edmund L. Palmieri, a Judge of the United States District Court for the Southern District of New York, denying two motions made by the petitioners for a new trial on newly discovered evidence:

(1) A motion on the ground that one of the jurors who sat in this case, John E. McLaughlin, and who had voted "guilty", had in his possession and read twice before

appearing for service as a juror in this case, a Handbook for Petit Jurors, which contained erroneous principles of law governing the trials of criminal cases and ignored, by failing to state at all, the legal and constitutional rights of an accused in a criminal case, which Handbook had been given to him by the Clerk of the United States District Court, Southern District of New York; and

(2) The other motion made on the ground that two jurors who sat in this case, Boyle and McLaughlin, knew Charles Potter, brother of John Potter, one of the petitioners herein. This motion was denied without a hearing.

The Allied Stevedoring Corporation was fined $10,000. on April 16, 1956, by Judge Palmieri, United States District Court, Southern District of New York; the petitioner John Ward received a sentence of four years, fined $10,000, and to pay one-half costs of prosecution; petitioner Michael Bowers received a sentence of five years, fined $10,000, and to pay one-half costs of prosecution; the petitioner John Potter received a sentence of one year and one day, which was amended on July 11, 1957, to "execution of sentence suspended, probation for one day".

Reasons for Granting the Writ

I.

This Handbook which this juror, John E. McLaughlin, had read twice before appearing for service as a juror in this case, and before being accepted as a juror and rendering a verdict of "guilty" contained many serious and grave

errors of law, and failed to state the legal and constitutional rights of an accused in a criminal case.

II.

The fact that this juror, John E. McLaughlin, had read twice this Handbook before being accepted as a juror in this case and voted "guilty", has deprived the petitioners of a fair trial by indoctrinating this juror, McLaughlin, with erroneous rules of law and failing to afford these petitioners their legal and constitutional rights in a trial of a criminal case.

III.

On the hearing conducted by Judge Palmieri of the United States District Court, Southern District of New York, with this juror John E. McLaughlin present, this juror who had read this Handbook twice at first could not testify that he did not have the Handbook in his possession when he entered the jury room to deliberate with the other jurors as to the guilt or innocence of the petitioners. He later testified that he may have glanced at the Handbook while deliberating with the other jurors.

IV.

A Legislative Act, an Act of Congress, is required and necessary in order to give any person qualified for jury service and appearing for jury service a primer, pamphlet or handbook. A court or a Judicial Conference or Senior Circuit Judges representing the Courts, are without au-

thority to issue and cause a Handbook to be printed at the United States Government Printing Office for the purpose of distribution to any juror.

V.

On the voir dire examination when the two jurors, Boyle and McLaughlin, who were accepted as jurors and voted "guilty", heard the name of John Potter, one of the petitioners, it was their duty to inquire of the Trial Court whether John Potter was related to the Charles Potter who is the brother of John Potter, one of the petitioners herein. Leniency was recommended for the petitioner, John Potter, by the jury, and not for the other petitioners. The Court should have held a Hearing, and not denied the motion merely on the papers submitted.

Statutes and Rules Involved

STATUTES INVOLVED:

Title 26, Section 145 (b), U. S. C.—unlawfully attempting to defeat and evade a large part of taxes due and owing by Allied Stevedoring Corporation—one count.

RULES INVOLVED:

Rule 33 of the Federal Rules of Criminal Procedure.

New Trial

"The Court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the

judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within five days after verdict or finding of guilty or within such further time as the court may fix during the five day period."

28 U. S. C., Sec. 2255, Federal Custody Remedies on motion attacking sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the rules and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment

vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

Facts:

The petitioners were convicted of a violation of Title 26, Section 145 (b), U. S. C., as officers of the Allied Stevedoring Corporation. They had been indicted on their own personal income tax returns and the motion to dismiss that indictment was granted by the Court.

Subsequent to reading the case of *Gordon* v. *United States of America*, in the United States Court of Appeals, Seventh Circuit, inquiry was made by me at the Clerk's office of the United States District Court for the Southern District of New York, as to whether there were any Handbooks for Petit Jurors. The answer was in the affirmative by the Clerk, who stated that he did not distribute the Handbook but would give it to a juror if a juror requested such a Handbook.

The jurors who sat in this case were then interviewed and one of the jurors, John E. McLaughlin, swore to an affidavit, that he had thoroughly read twice the Handbook. This juror's affidavit was submitted on the motion to set aside the conviction of the petitioners herein and for a new trial on newly discovered evidence. Judge Palmieri of the United States District Court, Southern District of New York, set the motion down for a hearing, requesting the appearance of this juror. The juror, in substance, testified that he used the Handbook as a guide, that he could not recall whether he had the Handbook with him when he

entered the juryroom to deliberate with the other jurors, but later in his testimony, said that he may have glanced at the Handbook. He denied showing the Handbook to the other jurors.

The opinion of the United States Court of Appeals, Second Circuit, affirming the orders of Judge Palmieri, a Judge of the United States District Court, Southern District of New York, is printed herewith as the Appendix A.

Reasons for Granting the Writ

I.

This Handbook which this juror John E. McLaughlin had read twice before appearing for service as a juror in this case, and before being accepted as a juror and rendering a verdict of "guilty", contained many serious and grave errors of law, and failed to state the legal and constitutional rights of an accused in a criminal case.

The Handbook at first lists six stages of trial:

1. Opening statements of counsel.

2. Plaintiff calls witnesses to prove plaintiff's case.

3. Defendant calls witnesses to disprove plaintiff's case and to establish defendant's contentions.

4. Plaintiff may call witnesses to rebut new matter advanced by defendant's witnesses.

5. Argument of Counsel.

6. Charge of the Court.

We must consider that a jury is made up of possibly a jeweler, a furrier, a salesman, a housewife, etc., people who are just lay people, thoroughly untrained in the law. At first glance a juror, a lay person, would get the impression that the above applies to trial of all cases. The Handbook dealing with indictments reads as follows:

> "Obviously, therefore, only one side of the case, that is, the Government's side, is presented before this body. Since our ideas of justice require that a defendant shall have the right to present his defense, the finding of an indictment by a grand jury is not to be considered evidence of the defendant's guilt" (p. 19).

By reading the above "since our ideas of justice require that a defendant shall have the right to present his defense, the finding of an indictment by the Grand Jury is not to be considered as evidence of defendant's guilt", a lay person, a juror, would be waiting for the defendant to proceed with his defense.

Of course, the law is that the defendant in a criminal case need not present any defense, need not take the witness stand, need not ask a question during the entire trial, even waive his summation to the jury, and the Court would have to charge the jury that the defendant is presumed to be innocent and the burden rests upon the government to establish the defendant's guilt beyond a reasonable doubt,

and that that burden never shifts to a defendant to establish his own innocence.

There is nothing in the Handbook that states that a defendant in a criminal case is presumed to be innocent and that the burden rests upon the Government to establish the guilt of a defendant beyond a reasonable doubt. The very wording of the language heretofore referred to would surely impress the lay person that a defendant having the right to present his defense and failing to do so, would create a prejudice in the minds of any juror reading this Handbook.

The Handbook further states:

> "What has been said about the procedure in the trial of civil cases, applies also in a general way to criminal trials."

This Handbook does not provide that the measure of proof on the part of the Government is greater in a criminal case than in a civil case. In a civil case, only a fair preponderance of the evidence is required, while in a criminal case, guilt beyond a reasonable doubt is required.

This Handbook in dealing with the question of punishment states:

> "The jurors have no concern with the sentence which may be imposed if a defendant is found guilty, and they should not permit consideration of punishment to influence their decision. *Our laws give a wide range in sentences which may be imposed for many offenses* and if the jury finds a defendant guilty, it is for the Judge to decide what the sentence in the case shall be." (Italics ours.)

While the language—"the jurors have no concern with the sentence which may be imposed if a defendant was found guilty and they should not permit consideration of punishment to influence their decision", is the law, yet the language—"Our laws give a wide range in sentences which may be imposed for many offenses", could easily win over a wavering juror. A juror might feel, after many hours of deliberation, that there would be no chance of further holding out for a verdict of "acquittal" because, after all, the laws give a wide range in sentences which may be imposed for many offenses and therefore the accused could not be hurt very much.

There are statements in the Handbook dealing with the way a juror shall determine the credibility of a witness. Again, these excerpts from the Handbook with respect to the credibility of witnesses are written to favor the Government and to prejudice the defendant. There is no statement that if a witness lies as to a material fact, the jury may disregard and reject the entire testimony given by that witness or disregard and reject that portion of the testimony about which the witness has lied and accept the rest.

The Handbook further provides:

"Additional Definitions":

"An *expert witness* is a witness who has special scientific or professional training or experience in connection with the particular subject matter about which he is called to testify."

"A *hypothetical question* is a question put to an expert witness which asks his opinion concerning the conclusion to be drawn from stated facts. The

facts stated are such as the evidence proves or fairly tends to prove, or proof of which is offered in the case."

There is no statement contained in this Handbook that even the testimony of an expert may be rejected or disregarded by the jury. It merely directs the attention of the jury as to the qualifications of an expert witness. It appears that the jury has only to find that the witness is an expert, and the jury is then bound to accept his testimony. Whether the expert is mistaken or in error in his testimony or whether he has an interest in the case is not presented to the jury.

Expert witnesses were called by the Government on the trial of the petitioners because of the nature of the indictment.

Have there been reversible errors in this Handbook presented? Is a juror to be indoctrinated with these grave errors of law, and biased and prejudiced statements in this Handbook? Is liberty and life so cheap?

Counsel for petitioners did not know that there were any Handbooks for Petit Jurors in the United States District Court, Southern District of New York. In fact there were two former Assistant United States Attorneys for the Southern District of New York associated with counsel on the trial of this case and they did not know that there were any Handbooks for Petit Jurors in the United States District Court, Southern District of New York. It was only after the decision and first opinion in the case of *United States of America* v. *Gordon*, 7th Circuit, that counsel for appellants thought that he had nothing to lose to inquire of the Clerk's office of the United States Dis-

trict Court, Southern District of New York, as to whether there were any Handbooks for Petit Jurors and was advised that there were.

Chief Judge Clark of the United States Court of Appeals, Second Circuit, in his opinion affirming the Orders entered denying the motions for a new trial, which opinion is printed in the Appendix to this petition, stated:

> "The defendants' attack on the book consists of isolating specific passages which they regard as prejudicial. Many of these have been deleted in the new and much shortened "Handbook for Jurors" presently in use in the district courts. These excerpts, together with the gist of the defendant's objections, appear in an appendix to this opinion."

If the passages in this Handbook which have been complained of have now been deleted in a new Handbook for Jurors, why has this been done? Has it been finally realized that these many erroneous and prejudicial rules of law which a juror has been indoctrinated with should not be a part of the Handbook for fear that an accused would not be afforded the fair trial guaranteed to him by the Constitution? If there was nothing wrong with the rules of law that have been complained of in this petition, why were they not printed in a new Handbook for Jurors? Why were those prejudicial statements deleted from the new Handbook? There can be but one conclusion and that is that these erroneous and prejudicial rules of law which this juror, McLaughlin, read twice and was indoctrinated with, did not belong in the Handbook in the first instance.

II.

The fact that this juror John E. McLaughlin had read twice this Handbook before being accepted as a juror in this case and voted "guilty" has deprived the petitioners of a fair trial by indoctrinating this juror McLaughlin with erroneous rules of law and failing to afford these petitioners their legal and constitutional rights in a trial of a criminal case.

This juror, John E. McLaughlin, at the hearing testified that he considered this Handbook a guide yet accepted the law from the court.

Should a Handbook be given to a juror as a guide? Should a Handbook such as this, with prejudicial statements contained therein, be given to a juror as a guide? Is a juror to be indoctrinated with misleading and prejudicial statements of law with the hope that a Judge may be able to clear the juror's mind and completely obliterate any impressions that may have been made by the reading of this Handbook?

This Handbook constituted a charge to the jury before the trial began in the absence of the accused. If a recess were declared during a trial and an accused left the court room, and in the absence of the accused the Judge gave to the jury any instructions as to one particular rule of law, I submit that it would have to be conceded that the Court not alone has committed error but has deprived that accused of his constitutional right to a fair trial.

An accused must be present in the courtroom at every stage of his trial.

Yet here is a Handbook for Petit Jurors given to a juror who sat in this case and voted "guilty", which constitutes a charge to him as to what the law is before the trial began and in the absence of the accused.

Is American justice to tolerate that kind of procedure? It has been known to have taken place in totalitarian countries where the minds of people have been conditioned by pamphlets and books issued by Governments so as to deny an accused a fair trial.

But is it to take place in our own country?

These petitioners, by this juror having been indoctrinated with misleading and prejudicial rules of law contained in this Handbook, and the Handbook designedly leaving out the legal and constitutional rights of these petitioners, such as the presumption of innocence and the burden of proof being on the Government to establish guilt beyond a reasonable doubt, denied to these petitioners a fair trial.

We have always prided ourselves on the true and honest administration of justice. Let us not permit a juror, as was done in this case, to be indoctrinated with prejudicial rules of law with a complete absence of any statements as to the rights of an accused. To do so will merely mean that we have travelled down the road of Hitlerism and have subverted our courts of law to rendering the same kind of injustice that we complained about several years back.

III.

On the hearing conducted by Judge Palmieri of the United States District Court, Southern District of New York, with this juror John E. McLaughlin present, this juror who had read this Handbook twice, at first, could not testify that he did not have the Handbook in his possession when he entered the jury room to deliberate with the other jurors as to the guilt or innocence of the petitioners. He later testified that he may have glanced at the Handbook while deliberating with the other jurors.

It is basic that a juror should have nothing with him pertaining to the case or any rules of law while deliberating with other jurors in the jury room. All instructions should come from the Court and if a juror is in need of further instructions from the Court, it has always been the practice for the jury to send a note to the Court requesting such further instructions. When such further instructions are given to the jury, our laws require that the defendant be present.

Yet this juror, John E. McLaughlin, testified that he may have glanced at this Handbook in the Jury Room and then further advised the jurors on the question of punishment.

Is the liberty and freedom of an accused to be dealt with in that fashion? Should jurors be permitted to take this Handbook into a juryroom when in doubt as to the law and refer to it? Is there to be a Court charge to be made in a jury room while the jurors are deliberating, in the form of this Handbook?

In the first opinion in the case of *United States* v. *Gordon*, 7th Circuit, 1957, October Term 1956, April Session 1957, the Court in setting aside the judgment of conviction, after criticizing the contents of the pamphlet given to the jurors had this to say:

> "We are not impressed with the Government's argument that any misinformation imparted to the jury by means of the Handbook is immaterial because, in any event, the jury was obliged to accept and apply the law as given to it by the Court in its instructions. At any rate, it strikes us as a strange philosophy that a juror after he has been called for service can be officially indoctrinated with misleading and inaccurate information on premise that in the end he will by the Court's instructions be properly informed."

Upon reargument of the above case, on the petition of the Government for rehearing *en banc* on the issue of the Handbook, January Sessions 1958, Circuit Judge Parkinson in withdrawing and superseding the former opinion said:

> "Moreover, the grounds of the challenge, even if sufficient to properly present the issue, were not supported by sufficient proof. The only evidence offered by the defendant was that the handbooks were distributed to the prospective jurors with a suggestion that they be read. The record is completely devoid of any evidence that any of the members of the jury read the handbook or had any information as to its contents or, if r[illegible]d, would have been influenced thereby against the defendant. It was encumbent upon the defendant to introduce, or to offer, distinct evidence in support of the challenge and the failure to prove his contentions was fatal."

The instant case is therefore readily distinguishable from this opinion of Judge Parkinson. In this case, an affidavit of the juror, John E. McLaughlin, was submitted to Judge Palmieri attached to the notice of motion for a new trial on newly discovered evidence, stating that this juror obtained this Handbook from a Clerk in the Clerk's office of the United States District Court, Southern District of New York, and had read the Handbook twice, before appearing and being accepted as a juror in this case. Judge Parkinson, in his opinion in the *Gordon* case stated that the Handbooks were distributed to the prospective jurors with a suggestion that they be read, with the record being completely devoid of any evidence that any Juror read the Handbook, which was supplied here by the affidavit of the juror, John E. McLaughlin, in this case that he read twice this Handbook, before appearing for jury service in this case. It may well be assumed that Judge Parkinson would have adhered to the first opinion in the *Gordon* case had like evidence in that case been offered to him.

Despite the evidence that any juror read the Handbook in the case of *United States of America* v. *Gordon*, but merely on the distribution of Handbook to jurors, Circuit Judge Finnegan, dissenting in part, had this to say:

> "It is singular to note how late in the day my brothers would unearth a flimsy archaic technicality as their warrant for glossing over what three Judges of our Court originally thought was, an impingement 'upon the right of a defendant to a fair and impartial trial, as we think it does'.
>
> One embarks on an utterly futile pursuit when searching for any Act of Congress authorizing

publication and distribution of the Handbook by the *Judicial* Conference of the United States."

Judge Schnackenberg, Circuit Judge, in his opinion in the reargument in the *Gordon* case, stated that in *U. S. ex rel. Toth* v. *Quarles*, 350 U. S. 11, 23, where the Court quoted with approval from *Dunick* v. *Schiedt*, 293 U. S. 474, 486, as follows:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care."

Further, Judge Schnackenberg said:

> "It is significant that Judge Parkinson offers no disagreement with Judge Major's criticism of the handbook, recognizing that this Court 'gave minute and careful consideration to the contents of the handbook, and held it was prejudicial' ".

Further, Judge Schnackenberg said:

> "In view of the situation thus presented to us, it is unfortunate that Judge Major's opinion on the handbook issue is discarded and that the Courts of the country will have to wait until the point is again raised in some future criminal trial which results in a conviction and an appeal. I feel that the net result is that the wholesome effect of an opinion is dissipated and the administration of justice is left suspended on the handbook issue until it comes before a court of review at another time. Thus time and expense are unnecessarily wasted."

While Chief Judge Duffy and Judges Hastings and Parkinson ruled to supersede and withdraw the earlier opinion in this case of *United States of America* v. *Gordon*, Judges Finnegan and Schnackenberg adhered to the first opinion.

It is to be noted that the absence of proof that any juror read the Handbook in the case of *United States of America* v. *Gordon*, was the basis of the opinion of Judge Parkinson in declaring that the former opinion of July 16, 1957, in this case of *United States of America* v. *Gordon*, be withdrawn and superseded.

But in this case at bar this juror, McLaughlin, obtained the Handbook from the Clerk's office of the United States District Court, Southern District of New York, and read the contents of the Handbook twice. Surely the Clerk's office of the United States District Court acts on behalf of and is the agent of that Court.

Despite the absence of evidence that any juror read the Handbook in the case of *United States of America* v. *Gordon*, Circuit Court Judges Finnegan and Schnackenberg adhered to the first opinion.

IV.

A Legislative Act, an Act of Congress, is required and necessary in order to give any person qualified for jury service and appearing for jury service a primer, pamphlet or handbook. A court or a Judicial Conference or Senior Circuit Judges representing the Courts, are without authority to issue and cause a Handbook to be printed at the United States Government Printing Office for the purpose of distribution to any juror.

It is the law that a Legislative body of a state determines the qualifications of a juror.

The State of New York, Section 502, Judiciary Act, provides as follows:

"Qualifications of the Jurors

"In order to be qualified to serve as a trial juror, in a court of record, a person must be:

1. A citizen of the United States, and a resident of the County.

2. Not less than twenty-one nor more than seventy years of age.

3. The owner, in his or her own right, of real property of the value of one hundred and fifty dollars, or of personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

4. In the possession of his natural faculties, and not infirm or decrepit.

5. Free from all legal exceptions; of fair character; of approved integrity; of sound judgment; and well informed.

But a person who was assessed, on the last assessment-roll of the town, for land in his possession, held under a contract for the purchase thereof, upon which improvements, owned by him, have been made, to the value of one hundred and fifty dollars, is qualified to serve as a trial juror, although he does not possess either of the qualifications, specified in subdivision third of this section, if he is qualified in every other respect."

Chapter 121, Section 1861 of U. S. C. A.—Judiciary and Judicial Procedure provides as follows:

"Qualifications

"Any citizen of the United States who has attained the age of 21 years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities, to render efficient jury service."

This Act was amended on September 9, 1957, which added #"4":

"4. He is incompetent to serve as a grand or petit juror by the law of the state in which the district court is held. June 25, 1948, c. 646, 62 Stat. 951."

Our Government is divided into three branches, Executive, Legislative and Judicial. One may not infringe on the duties and responsibility of the other.

A Legislative Act is required to set forth the qualifications of a person for jury service. If that is the law, as it is, a legislative act, therefore, should be required to give to any juror any primer, pamphlet or Handbook to make him even a better juror.

A Judicial Conference of Senior Circuit Judges, it is submitted, is not permitted to cause to be published and distributed to jurors any primer, pamphlet or Handbook. As a matter of fact, Judge Finnegan in his dissenting opinion in the case of *Gordon* v. *United States of America*, which was reheard *en banc*, has this to say:

> "It is singular to note how late in the day my brothers would unearth a flimsy archaic technicality as their warrant for glossing over what three Judges of our Court originally thought was, an impingement 'upon the right of a defendant to a fair and impartial trial, as we think it does.'
>
> One embarks on an utterly futile pursuit when searching for any Act of Congress authorizing publication and distribution of the Handbook by the *Judicial* Conference of the United States."

It is urged that a Court may interpret an Act of the Legislature or constitutionality of a law or the conduct of a trial or entertain appeals from judgments entered, but surely cannot usurp the power of the Legislature by issuing a Handbook such as this one to a juror.

In the case of *People* v. *Schoos*, 399 Ill. 527, it was held that if a juror is to be indoctrinated generally in the

substantive rules of criminal law by means of a juror primer or otherwise, the task is legislative and not judicial.

Circuit Court Judge Finnegan, dissenting in part, on the reargument *en banc* in the case of *United States of America* v. *Gordon*, 7th Circuit, January Session, 1958, had this to say in his opinion:

> "One embarks on an utterly futile pursuit when searching for any Act of Congress authorizing publication and distribution of the Handbook by the Judicial Conference of the United States."

V.

On the voir dire examination when the two jurors, Boyle and McLaughlin, before being accepted as jurors and hearing the name of John Potter, one of the petitioners, it was their duty to inquire of the Trial Court whether John Potter was related to the Charles Potter who is the brother of John Potter, one of the petitioners herein. Leniency was recommended for the petitioner, John Potter, by the jury, and not for the other petitioners. The Court should have held a Hearing, and not denied the motion merely on the papers submitted.

While it may be contended that the affidavit of Joseph Potter, a brother of Charles Potter and of John Potter, one of the petitioners herein, was hearsay in that Charles Potter had told Joseph Potter at the wake of John Potter, that John Potter knew two of the jurors who sat in this case, and voted "guilty", but recommended leniency for John Potter, it is urged that the Court should not have

summarily denied the motion without a hearing. The hearing should have required the attendance of Joseph Potter, Charles Potter and the two jurors, Boyle and McLaughlin.

While I appreciate that jurors should not be put to annoyance after a verdict has been rendered in any case, yet where there is any evidence that any jurors knew any of the defendants, whether that evidence is presented by hearsay or otherwise, it is urged that the Court is in duty bound to conduct such a hearing.

Our system of justice should be beyond all attack and remain untrammelled by any act of injustice.

If the Federal Bureau of Investigation was informed that a juror was known to a defendant, it would be surely neglect of duty on the part of the Federal Bureau of Investigation if an investigation was not conducted. Yet the Court denied this motion without a hearing.

Liberty of an individual should be safeguarded beyond all measure. That has been the strength of our democracy and let it continue so.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY A. LOWENBERG
Attorney for Petitioners

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 393—October Term, 1957.

(Argued June 6, 1958 Decided July 11, 1958.)

Docket No. 25154

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ALLIED STEVEDORING CORPORATION, JOHN WARD, and MICHAEL BOWERS,

Defendants-Appellants.

Before:

CLARK, *Chief Judge*,
and PICKETT and MOORE, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*.

Appendix A

The defendants, Allied Stevedoring Corporation, John Ward, and Michael Bowers, appeal from the denials of two motions for new trials made pursuant to F. R. Crim. Proc., Rule 33. Affirmed.

GEORGE I. GORDON, Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for plaintiff-appellee.*

HENRY A. LOWENBERG, New York City, *for defendants-appellants.*

CLARK, *Chief Judge*:

This is a consolidated appeal from the denials of two motions for new trials. In March 1956 the defendants[1] were convicted of attempting to "defeat and evade" the income tax for the year 1951 of Allied Stevedoring Corporation in violation of Internal Revenue Code of 1939, §145(b). After the denial of a motion under F. R. Crim. Proc., Rule 35, for reduction of sentence, *United States* v. *Allied Stevedoring Corp.*, D. C. S. D. N. Y., 143 F. Supp. 947, we affirmed the convictions, 2 Cir., 241 F. 2d 925, certiorari denied 353 U. S. 984. On January 9, 1958, the defendants moved for a new trial under F. R. Crim. Proc., Rule 33, on the ground that they had just discovered that one of the jurors involved in the original conviction possessed and utilized "A Handbook for Petit Jurors" pre-

[1] John Potter, an original defendant, died prior to these motions.

viously issued to him by the Clerk of the United States District Court. After a full hearing the district court denied the motion. The defendants then made a second attempt to procure the same relief. In support of this motion they produced an affidavit by Joseph E. Potter, the brother of the deceased codefendant, John Potter, which alleged that a third brother, Charles Potter, told Joseph that he knew two of the jurors who convicted the defendants for some time prior to their selection. The district court denied this motion without a hearing.

It is questionable whether the defendants have made an adequate showing that the "newly discovered" evidence was unavailable at the time of the trial, had they exercised the required due diligence in their search for it. *United States* v. *Costello*, 2 Cir., May 20, 1958, certiorari denied *Costello* v. *United States*, S. Ct., June 30, 1958; *United States* v. *Hiss*, D. C. S. D. N. Y., 107 F. Supp. 128, affirmed 2 Cir., 201 F. 2d 372, certiorari denied *Hiss* v. *United States*, 345 U. S. 942. But in the interest of the prompt determination of criminal cases we have concluded to examine the merits of the claims made by the defendants and to treat their motions as requests for relief under 28 U. S. C. §2255, as well as motions made pursuant to Rule 33.

The defendants' second motion, chronologically, is so patently weak that it deserves only passing mention. On the original trial the jury submitted a recommendation for leniency with respect to the now deceased codefendant, John Potter. The court first sentenced him to one year and one day in prison, but later, on motion of the defendants, suspended his sentence, while refusing to reduce the

sentences of the others. Potter at that time was over 65 years of age and was suffering from cancer. The defendants argue in their motion papers that it was possible that the two jurors who allegedly knew Potter's brother "arranged a deal in the jury room to have leniency recommended for the defendant, John Potter, and then they would vote to convict," and that this fact "could have very easily resulted to the disadvantage of the defendants, Ward and Bowers, and to the advantage of the defendant, Potter."[2] Obviously a jury's differing treatment of codefendants can give rise to much speculation to explain the result. But if each time this occurs the disfavored codefendants are to be afforded the opportunity to recall the jury for a detailed interrogation, one of the cherished features of the jury system—the secrecy which attends its proceedings—will be sacrificed unnecessarily and for no justified purpose. Jurors might be exposed to undue criticism and annoyance or they might find themselves responsive to undue influences if such an easy opportunity were afforded to scrutinize their deliberations. In this very case, in fact, a shocking attempt was made to influence a juror, who had to be excused in the midst of the trial. D. C. S. D. N. Y., 143 F. Supp. 947, 952. This is not to say, however, that such examinations are prohibited in all cases. See, e.g., *Jorgensen* v. *York Ice & Machinery Corp.*, 2 Cir., 160 F. 2d 432, certiorari denied 332 U. S. 764, and Comment, *Impeachment of Jury Verdicts*, 25 U. of Chi. L. Rev. 360-372 (1958). But where they are sought, adequate grounds must be disclosed before a hearing will be ordered.

---

[2] Actually, as one juror testified during the hearing relating to the Handbook motion, the jury wished to recommend leniency because of Potter's age and ill health.

Appendix A

Here the affidavit of Joseph E. Potter is patently inadequate to justify a hearing. In it he seeks to establish some kind of acquaintanceship between another brother and two jurors solely on the basis of a hearsay statement of the third brother, who presumably was available to testify. Moreover, the extent of the acquaintanceship is left open for speculation. Certainly if there was any close relationship which would justify doubts as to the impartiality of these jurors, it had to be shown in the supporting papers. Presumably, however, such a relationship did not exist. But most important is the utter absence of any showing that the jurors knew that their "friend" was related to the codefendant, Potter. Obviously this is an essential element in the defendants' argument—one that must be shown to support an invasion of the jury room. This showing is too slight to call for a hearing or to raise any serious doubts regarding these convictions so amply justified by the evidence in the record.

The other motion, attacking the propriety of issuing to jurors in criminal cases the "Handbook for Petit Jurors," is also based on evidence which scarcely indicates any prejudice to the defendants. No Handbooks were issued to the panel in this case; but one juror, who testified at the hearing of this motion, had previously served in the Southern District of New York, at which time, at his request he had been issued the Handbook now under attack[3] His lucid testimony established that he had read the Handbook twice, once while awaiting jury service in a prior

[3] The Handbook involved here ("A Handbook for Petit Jurors") was an old edition of "Handbook for Jurors serving in the United States District Courts," which has since been revised.

case and again just prior to the trial in this case. Although he could not remember whether or not he had produced the Handbook in the jury room after the court delivered its instructions, he recalled in great detail that the only time he made any reference to the book was when the jury was discussing its power to recommend leniency for John Potter. At that time he told his fellow jurors that the sentence was for the court, and that the jury had the power only to render a verdict of guilt or innocence. He further testified that he did not rely on the Handbook in any other way, as he considered it only a guide for jurors—not a detailed set of instructions for a specific case.

The effect of the book on the rest of the jury is best illustrated by the fact that they ignored this juror's statement and asked the court for a special instruction concerning the propriety of recommending leniency. Under these circumstances it seems clear that the defendants have not shown any grounds for relief, even if the issuance of the Handbook is considered as a deprivation of the right to a fair trial. All they have shown is that one juror studied a set of general instructions previously given to him at his request and was not affected in any vital way by them, and that the other jurors were wholly unaffected.

We believe that it is worthwhile, however, to consider the central issue here—the propriety of the book itself. It would serve no useful purpose to set out at length the history of its adoption and use. These facts, together with an excellent discussion upholding the value of the book and the constitutionality of its use, with which we concur, are well set forth in the concurring opinion of Chief Judge

Duffy in *United States v. Gordon*, 7 Cir., 233 F. 2d 177, 185, see also the opinion of Chief Judge Simon in *Horton v. United States*, 26 U. S. L. Week 2651 (6 Cir., June 12, 1958). The defendants' attack on the book consists of isolating specific passages which they regard as prejudicial. Many of these have been deleted in the new and much shortened "Handbook for Jurors" presently in use in the district courts. These excerpts, together with the gist of the defendants' objections, appear in an appendix to this opinion.[4]

Their argument proceeds as if these passages were part of the instructions given to the jury in this case by the district court. But this is unwarranted, for even a casual perusal of the Handbook shows that it was not a set of instructions for any specific case, but rather a general guide to the duties of a juror for persons unfamiliar with this role. This was apparent to the juror who testified here and there is no reason to believe that others would consider it differently. Many persons seem to believe that they have a constitutional right to an ignorant jury uninformed as to their function. But we know of nothing requiring such ignorance as a condition of a fair trial. And we cannot agree that such a requirement would be wise. To fulfill his function effectively, a juror should understand the place of the jury in the judicial scheme. This general guide helps to accomplish this salutary purpose with a minimum of the distortion so often found in a "general" treatment of any subject.

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[4] See Appendix *infra*.

Appendix A

An examination of the whole Handbook, rather than just the excerpted portions, shows that it attempts to give prospective jurors a general picture of what occurs at a typical trial. After a prefatory note on the importance of jury service under the American system of administering justice, the book makes reference to the classes of cases, civil and criminal, brought in the federal courts. It then, for illustrative purposes, sets forth a hypothetical case (which is carefully denominated as civil) and follows the case through the six major stages of trial following the *voir dire* examination. Passages then follow which are devoted to the argument of counsel and the charge of the court pointing out what the jury can expect from the lawyers and the judge. Following these is a long passage on criminal cases which discusses indictments, informations, and sentencing. This passage is obviously background material intended to aid the jury to comprehend the nature of a criminal proceeding; it was not intended, nor does it appear, as a statement of all the relevant presumptions and safeguards which attend a criminal case. The balance of the book is devoted to the conduct of the jurors both in court and in the jury room. At the end of the volume there is a set of short definitions of unfamiliar titles to enable the juror to understand the functions of various persons who participate in a trial. The whole book is so obviously a general explanation of courtroom procedure aimed at aiding a layman unfamiliar with judicial proceedings to grasp the nature of his function as a juror that we cannot avoid surprise at the kind of controversy and alarm exemplified in the dissenting opinions in the *Gordon* case.

We find nothing improper in the use of the Handbook. In fact we believe that it accomplishes a necessary purpose and that its use should be encouraged.

Judgments affirmed.

APPENDIX

The defendants claim that the following illustrative example of a "typical civil case" would mislead a jury in a criminal proceeding:

"THE SIX STAGES OF TRIAL

"The jury has been sworn and the trial proceeds. The several stages of the trial are six. (1) The opening statements of counsel in which counsel, for the plaintiff, then for defendant, give the jury a preview of what each side will prove. (2) Plaintiff calls witnesses to prove plaintiff's case. (3) Defendant calls witnesses to disprove plaintiff's case, and to establish defendant's contentions. (4) Plaintiff may call witnesses to rebut new matter advanced by defendant's witnesses. (5) The case is argued by counsel. (6) The judge charges the jury as to the law and may advise the jury upon the facts."

The defendants argue that the following statement fails to disclose that the Government has the burden of proving guilt beyond a reasonable doubt:

"What has been said about procedure in the trial of civil cases, applies also in a general way to criminal trials."

But the defendants fail to cite passages having an obvious contrary effect, for instance:

> "When persons are charged with offenses against the law, and their guilt has been established beyond a reasonable doubt, juries should have no hesitancy in declaring their guilt. * * * On the other hand, if the guilt of a defendant is not established beyond a reasonable doubt, jurors with equal readiness should render a verdict of 'not guilty.'"

The defendants argue that the following excerpt leads only to the conclusion that the defendant, after indictment is *required* to present his defense:

> "The grand jury meets in secret session. The United States attorney, who is the Government's prosecuting official, presents his charges before the grand jury and produces evidence to substantiate the charges. If after hearing such evidence, the grand jury believes that a crime has been committed and that there is reasonable ground to believe that the defendant is responsible for the crime, it finds a true bill of indictment and presents it to the district court. These are technical phases which mean that the grand jury believes that there is evidence which requires that the defendant be brought to trial on the charges set forth in the indictment. Ordinarily, neither the defendant nor any of his witnesses are heard by the grand jury. Obviously, therefore, only 1 side of the case, that is, the Government's side, is presented before this body. Since our ideas of justice require that a defendant shall have the right to present his defense, the finding of an indictment by a grand jury is not to be considered evidence of the defendant's guilt."

Appendix A

The defendants fail to state the basis of their objections to the following excerpt from the Handbook which deals with punishment:

> "The jurors have no concern with the sentence which may be imposed if a defendant is found guilty, and they should not permit consideration of punishment to influence their decision. Our laws give a wide range in the sentences which may be imposed for many offenses and if the jury finds a defendant guilty, it is for the judge to decide what the sentence in the case shall be."

The defendants object that the Handbook fails to state in the following passages that the jury can disregard the testimony of an expert witness:

> "ADDITIONAL DEFINITIONS
>
> * * * * * *
>
> "An *expert witness* is a witness who has special scientific or professional training or experience in connection with the particular subject matter about which he is called to testify.
>
> "A *hypothetical question* is a question put to an expert witness which asks his opinion concerning the conclusion to be drawn from stated facts. The facts stated are such as the evidence proves or fairly tends to prove, or proof of which is offered in the case."

We do not gild the lily by further characterization of these contentions.

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JAMES R. BROWNING, Clerk

No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALLIED STEVEDORING CORPORATION, JOHN WARD, JOHN POTTER AND MICHAEL BOWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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OPINIONS BELOW

The opinions of the district court (A. 19–21; AA. 23–32)[1] are not reported. The opinion of the court of appeals (Pet. 26–35) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1958 (Pet. 1, 25). The petition for a writ of certiorari was filed on August 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

[1] A. designates Appellants' Appendix, Vol. I; AA. designates Appellant's Appendix, Vol. II.

QUESTIONS PRESENTED

1. Whether a single juror's perusal of a handbook for petit jurors which he had obtained several years before trial warranted granting a new trial almost two years after conviction, where upon the basis of a full hearing the courts below concluded that petitioners could not have been prejudiced.

2. Whether, nearly two years after conviction, the trial court erred in denying without a hearing a motion for a new trial on the ground of newly discovered evidence based on an affidavit by a brother of petitioners' deceased co-defendant[2] alleging that a third brother had said that he knew two of the jurors.

STATUTE AND RULE INVOLVED

28 U. S. C. 2255:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause

[2] The deceased co-defendant is named as a petitioner in this proceeding although he had died before the proceeding was instituted in the district court.

notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * * * * *

Federal Rules of Criminal Procedure, Rule 33:

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

On July 29, 1953, petitioners were indicted in the United States District Court for the Southern Dis-

trict of New York on charges of income tax evasion. They were convicted on March 23, 1956, and sentenced on April 16, 1956. A motion to vacate their sentences was denied on July 20, 1956 (143 F. Supp. 947), and the convictions were affirmed in February 1957 (241 F. 2d 925). This court denied certiorari (353 U. S. 984). Motions for reduction of sentences were denied by the trial judge as to petitioners Bowers and Ward on July 3, 1957, but granted as to their co-defendant Potter on July 10, 1957, the execution of his sentence being suspended. Potter, who was then sixty-four years old and suffering from cancer, is now deceased.

On January 9, 1958, petitioners moved for a new trial under Rule 33 of the Federal Rules of Criminal Procedure on the ground of newly-discovered evidence, alleging that one of the jurors in the case had read a booklet called "A Handbook for Petit Jurors" which he had obtained from the clerk of the district court. (AA. 4–8.)[*] The district court (Judge Palmieri, who had presided at the trial) granted a hearing, at which the testimony of this juror, John E. McLaughlin, was taken (AA. 8–19, 29–32), and thereafter denied the motion (Pet. 26–27; AA. 23–32).

McLaughlin testified that several years earlier, when he was called for federal jury service for the first time, he had obtained the handbook from the Clerk and had taken it home and read it; that he had reread it when he was selected as a juror for the trial of the instant

[*] This handbook, a copy of which has been lodged with the Clerk of this Court, was published by authorization of the Judicial Conference of Senior Circuit Judges, for the use of petit jurors in the district courts of the United States.

case; that during the jury's deliberations the only use he had made of knowledge gained from the booklet was in connection with the verdict of guilty against defendant John Potter, now deceased; that, after the verdict against Potter had been reached, one of the jurors remarked that in view of his age and health a guilty verdict might be tantamount to a life sentence; that McLaughlin told the jury that the matter of punishment was not the concern of the jury, but of the judge; and that he had made no other use of the handbooks. (AA. 9–14.) Nothwithstanding McLaughlin's statement to the jury, they returned to the courtroom and asked the court whether it was in their power to recommend leniency, whereupon Judge Palmieri gave a supplemental instruction in which he charged, *inter alia* (AA. 31):

> Now while you may make a recommendation of leniency for any or all of the defendants, it is not legally binding upon me. In the event one is made, however, I will give it consideration. But let me stress one thing: no consideration regarding the penalty which may be imposed should, in any way, affect your prior determination as to whether or not any or all of the defendants should be found guilty. In other words, you must be sure that your verdict is reached in accordance with the principles laid down in my charge, independent of any considerations regarding penalties * * *.

There was no showing or allegation that any of the jurors except McLaughlin had ever possessed one of the handbooks. (AA. 15, 19.)

After their first motion for new trial had been denied, petitioners made a second such motion, sup-

ported by an affidavit of Joseph E. Potter, a brother of the deceased defendant, John Potter. Joseph Potter's affidavit stated that he had been advised by a third brother, Charles Potter, that Charles had known two of the jurors for some time prior to the trial of the instant case. The district court denied this motion without a hearing. (AA. 19–21.)

Appeals from the denials of the two motions were consolidated and the court of appeals affirmed.[1] (Pet. 26–35.)

ARGUMENT

1. The contention (Pet. 7–23) that a new trial should have been granted because one of the jurors had read the "Handbook for Petit Jurors" is wholly without substance. In the first place, the matter should have been raised on the *voir dire* examination of the prospective jurors. Not having done so, petitioners are in no position to complain at this stage of the case. *United States* v. *Gordon*, 253 F. 2d 177, 185 (C. A. 7); *United States* v. *Mathison*, (C. A. 7), decided June 19, 1958, petition for a writ of certiorari pending, No. 93 Misc., this Term; cf. *Frazier* v. *United States*, 335 U. S. 497, 512–513. Second, the federal court in the Southern District of New York,

[1] The court of appeals treated the appeals as though they were styled applications for relief under 28 U. S. C. 2255 as well as motions for new trials on the ground of newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure. The appeals, like the petition for certiorari, made no mention of new evidence presentable to a jury. In denying bail to the surviving petitioners on May 14, 1958, the court of appeals stated that "the claim of newly discovered evidence is utterly frivolous."

unlike federal courts in many other districts throughout the country at the time in question, did not make a practice of distributing the handbooks to all jurors, but gave them out only on special request. So far as appears here, Juror McLaughlin was the only juror sitting in this case who possessed such a booklet. That alone is sufficient to distinguish the instant situation from that presented in *United States* v. *Gordon*, *supra*, and to render inapplicable the dissenting opinions in *Gordon*, upon which petitioners necessarily rely. (Pet. 16–19, 22, 23.) In the third place, the record here shows affirmatively that Juror McLaughlin made no use of the knowledge he had gained from the handbook except to tell the other jurors, after John Potter had been found guilty and someone had suggested the advisability of recommending leniency because of his age and health, that the punishment was no concern of theirs. That the jury did not rely on this advice is shown by the fact that they returned to the courtroom and put to the trial judge the question of their power to recommend leniency. Finally, even if we were to concede (which we do not) that by some stretch of the imagination John Potter might have been prejudiced by McLaughlin's reading of the handbook, it is clear that the surviving petitioners (the only parties now before the Court) could not have been affected.[*]

[*] We see no occasion, in the circumstances of this case, to defend the use of this handbook. There are enlightening discussions of its merits in the opinion of the court of appeals in the instant case (Pet. 30–33) and in the concurring opinion of Chief Judge Duffy in *United States* v. *Gordon*, 253 F. 2d 177, 185–188 (C. A. 7).

2. Petitioners' second contention (Pet. 23–24) rests solely upon the hearsay affidavit of Joseph Potter, brother of the deceased defendant, John Potter, which alleges that Charles Potter, another brother, told Joseph Potter that Charles Potter had known two of the jurors for some time prior to the trial. There is no allegation that either of the two jurors knew any of the petitioners; that either of the jurors knew Charles Potter; or that, if either of them did know Charles Potter, they knew his relationship to the deceased co-defendant. Even if the truth of the hearsay allegation were admitted, no inference of prejudice to the petitioners could be drawn.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1958.

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